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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE FRANCISCO FLORES, Defendant and Appellant.	B191172 (Los Angeles County Super. Ct. No. KA071911)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

Diana M. Teran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jose Flores appeals from a judgment entered after the jury found him guilty of first degree murder. (Pen. Code, § 187, subd. (a).)[1] The jury also found true the allegations that appellant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)), personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and was personally armed with a firearm. (§ 12022, subd. (a)(1).)

CONTENTIONS

Appellant contends that: (1) the trial court erred by refusing to instruct on the lesser included offense of manslaughter based on a theory of heat of passion; and (2) the trial court erred when it responded to the jury's question about premeditation without attempting to understand how it could best assist the jury.

FACTS AND PROCEDURAL HISTORY

In May 2005, Denise Quepones (Quepones) lived with her three children and appellant in the City of La Puente. Quepones had been in a relationship with appellant for eight months. Appellant broke Quepones's cell phone because he did not want her to talk to anybody else. He also made her quit her job as a stripper. Quepones had been separated for three years from her husband Julian Toban (Toban), who was the father of her three children. Quepones told appellant two or three times, that she had left Toban because he physically abused her. Quepones believed that Toban sometimes carried a pocket knife. She never told appellant that Toban carried a gun.

On May 20, 2005, Toban and Quepones agreed to meet at a restaurant to talk about a divorce and child support. Quepones had not seen Toban in the past year. Quepones told appellant that she was going to meet Toban, and appellant insisted on accompanying her. When they arrived at the restaurant, Quepones asked appellant if he wished to join them in the restaurant but appellant said he preferred to stay in the car. When Quepones and Toban came out of the restaurant, appellant suggested that they see

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[1] All further statutory references are to the Penal Code.

his attorney friend to talk about the divorce. Toban agreed and suggested they all go in Quepones's car. Appellant jumped over the center console, and sat in the back. Toban sat in the front passenger seat and Quepones drove. Appellant asked Quepones to turn down the radio volume. Quepones could hear appellant moving around in the back. She and Toban began arguing, and Toban began cursing at her, but he did not strike her or attempt to strike her. Using vulgar language, appellant told Toban not to talk to Quepones that way, then shot Toban in the back several times. Appellant grabbed Toban and tilted him back. Quepones could hear sounds of someone being punched. Appellant told Quepones to take the next off-ramp. He then climbed onto the middle console, unbuckled Toban's seatbelt, opened the car door, and threw him out the door.

Appellant moved to the front passenger seat, removed socks or gloves from his hands, and directed Quepones to drive to his friend's house. At his friend's house, appellant cleaned himself and the vehicle with paper towels. Appellant drove back to their apartment in La Puente, stopping on the way to try to smash out the bullet-ridden windshield. The next day, appellant and Quepones went to appellant's parents' house, where appellant and his brother cleaned the car. The following day, after hearing that the police were looking for them, appellant, Quepones, and her children drove with appellant's parents to Mexico. Appellant's parents dropped them off at appellant's cousin's house, where appellant left the gun used to kill Toban. Quepones contacted the Mexican police as well as the Los Angeles Sheriff's Department and told them what happened. She was afraid that appellant might hurt her. The Mexican police arrested appellant and brought Quepones to the border where she was met by Los Angeles Police Department Detective Richard Lopez.

Toban was found unconscious between 11:00 a.m. and 11:30 p.m. by a California Highway Patrol officer who had been summoned to the scene by other drivers who had found Toban. Toban died as a result of five gunshot wounds to his back. Each of the wounds was surrounded by a black circular indentation caused by the gun muzzle being placed in close contact with his body when the gun was fired. Quepones's car was found

on May 28, 2005, in Irwindale. It had been stripped, sprayed with a solvent, and the windshield was broken.

Appellant testified in his defense that Quepones had told him Toban had once pulled a knife on her. Appellant went with Quepones to meet Toban because he wanted to make sure she was safe. He brought his gun because Quepones had told him Toban had a history of violence and usually carried a knife in his pocket. Appellant thought that Toban might have a gun on him. After Quepones and Toban left the restaurant, Toban suggested they pick up his girlfriend in Quepones's car and return to the restaurant to have dinner together. Appellant became concerned because he thought that Toban's girlfriend lived in Pomona, and they were driving in the wrong direction. Toban asked Quepones "Why the fuck did you bring this motherfucker here for? You should have came (sic) by yourself." Toban and Quepones began arguing, and Toban lifted his arm to strike her. Appellant pushed Toban's seat forward to jam him between the dashboard and the seat. Toban swung his left elbow up, but appellant could not recall if Toban hit him. Toban tried to change his position. Appellant punched Toban in the face, then saw Toban lift his shirt and put his left hand in his waistband. Appellant believed Toban was reaching for a weapon, so he shot Toban. He admitted that he pushed Toban out of the car.

Detective Lopez testified that the front passenger seat could not be pushed up without moving the lock mechanism on the right hand side of the seat.

DISCUSSION

I. The trial court did not err in refusing to instruct on the lesser included offense of manslaughter based on a theory heat of passion

Appellant contends that the trial court erred by refusing to instruct the jury on voluntary manslaughter based on heat of passion. We disagree.

Instructions on a lesser included offense are required whenever evidence that the defendant is guilty only of the lesser offense is substantial enough to merit consideration by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) Substantial

evidence is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Id.* at pp. 162–163.) We review the trial court's decision under a de novo standard of review. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

Manslaughter is the unlawful killing of a human being without malice and constitutes a lesser included offense of murder. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 583.) One who kills in the heat of passion after being provoked by the victim or actually but unreasonably believed he was in imminent danger of death or great bodily injury, is guilty of voluntary manslaughter. (*Id.* at pp. 581–583.) "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter (*ibid.*), if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'"" (*Breverman*, *supra*, 19 Cal.4th at p. 163.)

Here, the trial court gave a voluntary manslaughter instruction with respect to unreasonable self-defense, but refused to instruct as to heat of passion.[2]

Appellant urges that during the heated physical and verbal exchange between Quepones, Toban and appellant, Toban lifted his shirt, causing appellant to believe he was going to retrieve a weapon. Appellant contends that his knowledge of the history of violence between Toban and Quepones as well as Toban's quarrel with Quepones caused him to act without sufficient time to reflect. But, Quepones had been separated from Toban for three years and had not seen him in the past year. Nor was there evidence that Toban had abused Quepones since they separated. Indeed, appellant had never met

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[2] CALJIC No. 8.50 as given, provides: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent."

Toban until the day he killed him. According to Quepones, appellant suggested they all drive to his attorney friend's house and Quepones could hear appellant moving around in the back while she was driving. Appellant punched Toban, then unbuckled him and threw him out of the car. Appellant wore socks or gloves on his hands. He then directed Quepones to a friend's house where he cleaned out the car. He attempted to smash out the bullet-ridden windshield, and to clean the car again at his parents' house. He also fled to Mexico with Quepones and her children. The circumstances simply would not lead a reasonable jury to find that appellant's reason was obscured by passion such that an ordinarily reasonable person would act rashly and without reflection, thus causing him to shoot Toban in a sudden quarrel or heat of passion.

Breverman, cited by appellant, is distinguishable. In that case, a large group of young men, armed with bats, knives and clubs menaced the defendant, challenging him to fight. They used their weapons to batter the defendant's vehicle parked in the driveway of his residence, within a short distance of the front door. The defendant and others in the house indicated that the number and behavior of the intruders caused immediate fear and panic. "Under these circumstances, a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*Breverman*, *supra*, 19 Cal.4th at pp. 143, 162–163.)

Nor does appellant's citation to *People v. Barton* (1995) 12 Cal.4th 186 assist him. There, the trial court instructed with voluntary manslaughter as a lesser offense included in the crime of murder, over the defendant's objection. Although the defendant objected to the instruction on the basis that voluntary manslaughter was inconsistent with his theory that the killing of the victim was accidental, the trial court concluded that the state of the evidence supported such an instruction. (*Id.* at p. 194.) Unlike here, there was substantial evidence from which a jury could reasonably find that the defendant intentionally killed the victim in the heat of passion. The defendant's daughter was extremely upset after the victim tried to run her car off the road. When the defendant and his daughter confronted the victim, the victim called the defendant's daughter a bitch.

The victim acted berserk, assumed a fighting stance in challenging the defendant, and after the defendant told his daughter to call the police, the victim taunted him by saying "Do you think you can keep me here?" (*Id.* at p. 202.) The defendant screamed, swore, and ordered the victim to "drop the knife" and get out of the car. (*Ibid*.)

Here, appellant's testimony that he pushed Toban's seat forward in reaction to Toban's argument with Quepones and after Toban raised his arm to strike her would not have led a reasonable jury to infer that appellant was aroused to passion by provocation sufficient to obscure his reason as would cause an ordinarily reasonable person to act rationally and without reflection. At most, appellant's version, that he believed Toban was reaching for a weapon, supported a theory of unreasonable self-defense for which an instruction was given. The evidence simply did not support his theory that he was provoked by the argument between Toban and Quepones sufficient to cause an ordinary person to act without due deliberation, and the trial court did not err in refusing to give the requested instruction.

And, the jury's finding that appellant was guilty of first degree murder was an implicit rejection of appellant's testimony. Furthermore, the jury was instructed with second degree murder, which gave the jury the option to find that appellant did not act with premeditation, yet it chose to convict him of the higher degree of murder. Thus, we can infer that the jury would not have convicted appellant of voluntary manslaughter, had it been given that instruction. As such, even if we were to assume the trial court erred in failing to instruct on heat of passion voluntary manslaughter, the error would be harmless. (*People v. Manriquez, supra,* 37 Cal.4th at p. 582 [trial court refusal to give imperfect self-defense instruction but instead to give heat of passion instruction on voluntary manslaughter was proper; even if error, harmless in light of jury's rejection of defendant's version of events].)

II. The trial court did not err in responding to the jury's question on premeditation

Appellant contends that the trial court erred when it answered the jury question of whether a juror could look up the definition of the word "premeditation" in the dictionary. Appellant complains that the trial court should have directed the jury to reread the CALJIC No. 8.20 in its entirety.[3] He also argues that the trial court should have defined heat of passion because CALJIC No. 8.20 referenced the term "heat of passion." He claims that evidence that he acted under heat of passion supported further instructions defining heat of passion. We disagree.

Pursuant to section 1138, the trial court must inform the jury on any point of law it desires. If the original instructions are full and complete, section 1138 gives the trial court discretion to determine what additional explanations are sufficient to satisfy the jury's request for information. (*People v. Smithey* (1999) 20 Cal.4th 936, 985.)

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[3] CALJIC No. 8.20, as given, provides: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. [¶] The word 'willful,' as used in this instruction, means intentional. [¶] The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand. [¶] If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was a result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. [¶] The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing of murder of the first degree. [¶] To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill."

Here, the jury asked if it could look up the definition of the word "premeditation" in the dictionary. The trial court responded in writing: "No! The last sentence of the 3rd paragraph of instruction 8.20 reads: 'The word "premeditated" means considered beforehand.'" Neither party objected. It is presumed that the jury followed the instructions, in the absence of a contrary showing. (*People v. Stanley* (1995) 10 Cal.4th 764, 837.) The record shows that the jury had already been instructed with CALJIC No. 8.20 that premeditation and deliberation were required for first degree murder. Because the jury's request for clarification was limited to the definition of premeditation, there was no need for the trial court to reiterate the entire premeditation and deliberation requirement. Thus, the trial court did not abuse its discretion in failing to direct the jury to reread the entire instruction or elaborating on the definition of premeditation already given under CALJIC No. 8.20. And, as discussed in part I, *ante*, there simply was no substantial evidence of a sudden quarrel or heat of passion.

We find no merit in appellant's argument that the trial court erred in failing to consider how it could best aid the jury to understand the definition of premeditation because it refused to seek clarification from the jury regarding its confusion. The trial court properly directed the jury to the definition set forth in CALJIC No. 8.20 and neither party objected. Subsequent to the response, the trial court received no further inquiry from the jury regarding the definition of premeditation. Appellant's citation to *People v. Beardslee* (1991) 53 Cal.3d 68 is unavailing. In that case, our Supreme Court concluded that the trial court erred in advising the jury that it was not going to explain any instructions as requested by the jury. (*Id.* at p. 97.) Our Supreme Court held that the trial court must at least consider how it could best aid the jury. That was done here.

We conclude that the trial court did not abuse its discretion in directing the jury not to use a dictionary and by sending it the definition of premeditation as "considered beforehand."

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ